In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 845

ROBERT C. STUBBS and MARY ANN STUBBS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion, the case having been submitted to the jury. The opinion of the court of appeals (Pet. App. 15-21) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1970 (Pet. App. 21). A petition for re-

hearing was denied on July 16, 1970 (Pet. App. 19-20). The petition for a writ of certiorari was filed on October 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner,[1] who deeded a portion of his property to the City of Tucson for a public road in order to enhance the value of his planned mobile home development, was entitled to a charitable deduction under Section 170(c) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

The pertinent provisions of Section 170 of the Internal Revenue Code of 1954 are set forth in the petition (Pet. 2-3).

STATEMENT

Petitioner negotiated the purchase of a tract of land in Tucson, Arizona, with a view to developing it as a trailer park and shopping center. The purchase was contingent upon his obtaining favorable rezoning from municipal authorities. Petitioner had a preliminary plat of the property prepared which included the dedication of a narrow strip of the property as a public street. His purpose in proposing the dedication was to provide public access to the de-

[1] Robert C. Stubbs will be referred to as "petitioner." Mary Ann Stubbs is also party to this suit since a joint income tax return was filed.

velopment so as to increase the chances of obtaining favorable rezoning and enhance the value of the remaining property through additional, valuable public street frontage. Petitioner's plat, including the street dedication, was accepted by municipal authorities, the favorable zoning was granted, and the purchase of the tract was concluded. (Pet. App. 15-16; II-R. 168-169, 198.)[2]

On his federal income tax return for 1963, petitioner claimed a charitable deduction under Section 170(c) of the Internal Revenue Code of 1954 for the portion of the property dedicated to the city. Construing that provision as requiring that a transfer be motivated by a charitable purpose rather than the anticipation of direct economic benefits, the Commissioner disallowed the deduction on the ground that the purpose of the dedication was directly to benefit petitioner's remaining property and to assist him in obtaining favorable zoning. Petitioner paid the tax in dispute and thereafter brought this suit for refund. The district court instructed the jury, at the government's request, that if petitioner's purpose was as contended by the government he was not entitled to a charitable deduction. (Pet. App. 16.) The jury returned a verdict for the government (Pet. App. 14), and the court of appeals affirmed (Pet. App. 15-20).

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[2] "II-R." references are to Volume II of the reproduced record filed in the court of appeals.

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review by this Court.

1. The courts below applied the correct legal standard in determining that petitioner was not entitled to a charitable deduction under Section 170(c). In *Commissioner* v. *Duberstein*, 363 U.S. 278, 285, this Court stated that the term "gift" as used in the tax statute is to be interpreted in a "more colloquial sense" than it had at common law, and that if a transfer proceeds from the anticipation of an economic benefit, it is not a gift. In so concluding, the Court made it plain that the transferor's intention is the most critical element.

Although *Duberstein* dealt with the exclusion from gross income of property acquired by "gift" under the predecessor of Section 102(a) of the Internal Revenue Code of 1954, and the instant case deals with the "charitable contribution" deduction now provided in Section 170 of the Code, the terms "gift" and "contribution" as used in the tax statutes have long been recognized to be synonomous. *Wineberg* v. *Commissioner*, 326 F.2d 159 (C.A. 9); *Channing* v. *United States*, 4 F. Supp. 33 (D. Mass.), affirmed, 67 F.2d 986 (C.A. 1), certiorari denied, 291 U.S. 686; *Bok* v. *McCaughn*, 42 F.2d 616 (C.A. 3). Hence, the teaching of *Duberstein* is relevant in determining what is a charitable contribution, and it does not permit deductions in cases such as this one where the purpose of the transfer is not charitable but rather the anticipated acquisition of a direct economic bene-

fit. See *DeJong* v. *Commissioner*, 309 F.2d 373 (C.A. 9); *United States* v. *Transamerica Corp.*, 392 F.2d 522 (C.A. 9); *McLaughlin* v. *Commissioner*, 51 T.C. 233, affirmed, 69-2 U.S.T.C., par. 9467 (C.A. 1). As the court of appeals correctly observed (Pet. App. 17):

> The inquiry into motive and purpose here does more than probe the subjective attitude of the donors and the extent to which public spirited and charitable benevolence prompted their action. The inquiry serves to expose the true nature of the transaction: that, as the jury found, the "gift" * * * was in expectation of the receipt of certain specific direct economic benefits within the power of the recipient to bestow directly or indirectly, which otherwise might not be forthcoming. Taxpayers apparently wished to assure favorable zoning (otherwise uncertain) by guaranteeing public access to the mobile home development, and to secure public street frontage for some of their property. In both respects their objectives were realized.

2. Petitioner mistakenly asserts (Pet. 6) that the holdings in *Wardwell's Estate* v. *Commissioner*, 301 F.2d 632 (C.A. 8), and *Crosby Valve & Gage Co.* v. *Commissioner*, 380 F.2d 146 (C.A. 1), certiorari denied, 389 U.S. 976, are in conflict with the decision in the instant case and the decisions in *DeJong* v. *Commissioner*, *supra*, and *United States* v. *Transamerica Corp.*, *supra*.

In *Wardwell's Estate*, *supra*, the court did not reject an inquiry into the alleged donor's intention in making the contribution. Rather it made that inquiry

and found on the facts of that case (in contrast to the facts here) that the donor intended to make a contribution without an expectation of an economic benefit.

In *Crosby Valve*, it was held that a business corporation owned by a charitable organization was not entitled to a charitable deduction upon the transfer of bonds to its parent organization. The basis for the decision was that a charitable organization is not entitled to deductions for contributions to itself, and no reason existed for different treatment where the organization operated its unrelated trade or business through a wholly owned subsidiary. While the First Circuit's opinion does contain dictum questioning the role of intent in the context of a contribution by a corporation to a charitable organization (pp. 146-147), the dictum was not germane to the decision, and the court recognized that where a transfer is made in a business context an inquiry into intent is appropriate (p. 147). Moreover, in an opinion subsequent to that in *Crosby Valve*, the First Circuit has impliedly recognized intent as the appropriate test by affirming *McLaughlin* v. *Commissioner*, *supra*, in which the Tax Court relied heavily upon *DeJong*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

THOMAS L. STAPLETON,
KENNETH L. GROSS,
Attorneys.

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